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CHARLES ELMORE CROPLEY, Clerk

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR AMICI CURIAE.

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Attorney General of the Commonwealth of Pennsylvania.

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INDEX.

SUBJECT INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Specification of Errors	4
Summary of Argument	4
Argument	5
1. Duties and exercise of exclusive power granted the Congress by the Constitution	5
2. Duty as a tax on merchandise	8
Appendix (statutes involved)	11

Citations

	PAGE
Abbey Dodge, The, 223 U. S. 166	6
Arnold *v.* United States, 147 U. S. 494, 497	6
Brolan *v.* United States, 236 U. S. 216	6
Brown *v.* Maryland, 12 Wheat. 419, 439	8
Butterfield *v.* Stranahan, 192 U. S. 470	8
Faber, Coe & Gregg *v.* U. S., 19 C. C. P. A. (Customs)	8
Gibbons *v.* Ogden, 9 Wheat. 1	7
Hammer *v.* Dagenhart, 247 U. S. 251	6
Hampton *v.* U. S., 276 U. S. 394	6
Knowlton *v.* Moore, 178 U. S. 41, 88	6
License Cases, 5 How., 504, 575	8
Russell *v.* Williams, 106 U. S. 623	6
Sang Lung *v.* Jackson, 85 Fed. 502	6
Sonneborn Bros. *v.* Cureton, 262 U. S. 506	8
U. S. *v.* American Express Co., 177 Fed. 735, 738	6
United States *v.* Marigold, 9 How. 559	6
Weber *v.* Freed, 239 U. S. 325	6

Statutes

Act of Congress, September 21, 1922 (Tariff Act of 1922) C. 356, Title I, Sec. 1, 42 Stat. 858	11
Preamble Sec. 1	11
Paragraph 218	11
Paragraph 228	11
Paragraph 360	11
Paragraph 372	11
Sec. 201	12
Paragraph 1527	12
Paragraph 1530	12

Miscellaneous

Article I, Sec. 8—Paragraph 1	12
Article I, Sec. 8—Paragraph 3	12

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vs.
THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF OF AMICI CURIAE.

The Opinions Below.

The opinion of the United States Court of Customs and Patent Appeals (R. 63) is reported in 61 Treas. Dec. p. 1334 (T. D. 45773). The opinion of the United States Customs Court (R. 51) is reported in 59 Treas. Dec. p. 747 (T. D. 44751).

Jurisdiction.

The judgment of the Court of Customs and Patent Appeals became final through denial of a petition for rehearing on October 10, 1932, (R. 114); mandate was stayed by order of the Presiding Judge of that Court on October 17, 1932, (R. 115); petition for a writ of certiorari was filed in this Court on December 6, 1932; the

petition was granted on January 9, 1933. Jurisdiction of this Court rests upon Section 195 of the Judicial Code, amended by the Act of June 17, 1930, C. 497, Title IV, Sec. 647, 46 Stat. 762 (Sec. 308, Title 28, U. S. C. A.), and Section 8, Act of February 13, 1925, C. 229, par. 8, 43 Stat. 940 (Sec. 350, Title 28, U. S. C. A.). Should the amendment to Sec. 195 of the Judicial Code, made by the Tariff Act of June 17, 1930, be regarded inapplicable, because the importation took place in 1927, the filing of a certificate of importance by the Attorney General would, nevertheless, be unnecessary, inasmuch as the instant proceeding draws in question the construction of the Constitution of the United States.

Questions Presented.

1. Whether, under the Tariff Act of September 21, 1922, C. 356, Title I, Sec. 1, 42 Stat. 858, and particularly paragraphs 218, 228, 360 and 372 thereof, the Collector of Customs at the Port of Chicago had the right to levy and collect, and whether the Board of Trustees of the University of Illinois are obligated to pay customs duties on scientific articles imported for educational use by the University.

Subordinate subjects involved in the foregoing and discussed in the Court of Customs and Patent Appeals, are:

(a) To fix a rate of duty on any imported merchandise, no matter by whom imported, is a proper exercise of a power exclusively delegated to the Congress.

(b) Customs duties are levies upon merchandise.

Statutes Involved.

The statutes involved appear in the Appendix, pages 11 and 12.

Statement of the Case.

The merchandise involved in this suit is certain laboratory equipment imported by the University of Illinois, the petitioner, to be used for educational purposes. It was assessed by the Collector of Customs at the Port of Chicago with duty under various paragraphs of the Tariff Act of 1922. The University of the State of Illinois protested against the assessment by the Collector and claimed the merchandise to be free of duty upon the following allegations:

1. Said tax is illegal and wrongfully assessed.

2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

5. The assessment is paid to prevent seizure of the property of the University of Illinois.

The issues came on for trial before the United States Customs Court, which Court decided in favor of the Government in an opinion reported in 59 Treas. Dec. p. 747, (T. D. 44758). From the judgment of the Customs Court, an appeal was taken to the United States Court of Customs and Patent Appeals where the judgment of the Trial Court was affirmed in 61 Treas. Dec. p. 1334 (T. D. 45773). A petition for a writ of certiorari to the United States Court of Customs and Patent Appeals has been granted bringing on the judgment below for review.

Specification of Errors Urged by the Petitioner.

1. The Court of Customs and Patents Appeals erred in holding that the ad valorem duties collected from the Petitioner upon scientific equipment, which was purchased abroad because not obtainable in the home market, were properly collectible and did not constitute a prohibited burden upon, or an illegal tax on, property of the State of Illinois used by the latter in performing a strictly governmental function.

2. The Court of Customs and Patent Appeals erred in affirming the decision of the Customs Court.

Summary of Argument.

I.

It is within the power of the Congress. derived from the Constitution, to fix a rate of import duties to be paid when articles imported into this country from abroad enter the commerce of the United States. The power may properly be exercised for the purposes of raising revenue; it may be exercised as a measure adopted in pursuit of a national policy of protection for domestic industries; it may be exercised in regulating foreign commerce, since all these powers mentioned are within the exclusive grant of power. The purpose of the exercise of power can not be questioned so long as it is within the sphere of the constitutional functions of the Congress. The power is not restricted. The exercise of the power falls upon individuals, the Petitioner, the State and the Federal Government alike, if such be the will of the Congress.

II.

A duty on imports is a levy on the article *per se* for which the importer becomes ultimately liable. All customs statutes are predicated on the theory that when merchandise is brought into the jurisdiction of the port of entry, duty attaches and the Government through its statutes and regulations retains possession of the merchandise until all questions of duty are settled. If the duty were a tax on the individual, he would be entitled to immediate possession of and dominion over the merchandise, the Government proceeding against the individual in the collection of the tax.

ARGUMENT.

I.

All customs duties are levied by Congress under the grant of power in the Federal Constitution, clause 1, section 8, Article I, and clause 3, section 8, Article I. Said clauses read as follows:

> 1. To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;
>
> 3. To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

The powers granted to the Congress by these provisions of the Constitution are without restriction, and in the exercise of its functions it is difficult if not impossible to tell where Congress in levying duties is exercising its power to raise revenue or exercising its power

to regulate commerce since a duty may often result in a virtual embargo—

> not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. (*Brolan* v. *United States,* 236 U. S. 216).

It has repeatedly been announced that the Congress may place an embargo, total or partial, upon importations from foreign countries, under the exercise of the constitutional powers to regulate commerce. (*United States* v. *Marigold,* 9 How. 559; *The Abby Dodge,* 223 U. S. 166; *Weber* v. *Freed,* 239 U. S. 325; *Hammer* v. *Dagenhart,* 247 U. S. 251.) As Congress has the right to absolutely prohibit importation, it also has plenary power to prescribe the conditions upon which the importation may be made. (*Sang Lung* v. *Jackson,* 85 Fed. 502; *United States* v. *American Exp. Co.,* 177 Fed. 735, 738)—

> • • • Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. (*Knowlton* v. *Moore,* 178 U. S. 41, 88).

An additional duty fixed upon goods coming from east of the cape of Good Hope was held to be valid as a regulation of commerce. (*Russell* v. *Williams,* 106 U. S. 623). In the more recent case of *Hampton* v. *United States,* 276 U. S. 394, this Court was of the opinion that a customs duty, although imposed in pursuance of an expressed policy of protection to domestic industries, was valid and enforcible. To like effect was *Arnold* v.

United States, 147 U. S. 494, 497. The power to regulate commerce——

> like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. (*Gibbons* v. *Ogden,* 9 Wheat. 1, 196.)

From the decisions of this Court above cited, it appears conclusive that it was within the constitutional power of the Congress to levy duties when the articles here imported entered the commerce of the country irrespective of the individual or the instrumentality causing their importation. This it might do for the purpose of raising revenue, of providing protection to the industries of the country, or of regulating foreign commerce, inasmuch as the exercise of all of these is within the exclusive power delegated by the Constitution. If, therefore, the levy of duty upon the articles imported falls within this exclusive power, it can not be questioned by one who causes the importation of the articles. Had the Congress placed an embargo on the importation of the articles here imported, it seems from the citations given above that it would apply with equal force to the State of Illinois and its instrumentality as it would to individuals importing like merchandise. It follows that what the Congress has power to do in full, it may do in part.

If there is any doubt as to the intent and purpose of the Congress in enacting the statute prescribing the duties on the importation of the articles here, reference to the preamble of the statute will clearly dispel it:

> An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes (Tariff Act of 1922, supra.).

II.

There is no vested right to import into the United States merchandise from a foreign country. It is a privilege conferred by act of the Congress upon the terms prescribed by the Congress and may only be exercised by complying with the restrictions placed upon it. (*Buttfield* v. *Stranahan*, 192 U. S. 470.) Nor, in reason, can it be seen how an agency of a State stands in any position different from an individual in this respect. The petitioner, in exercising its privilege to import, did so subject to the conditions prescribed by the Congress, one of which was the payment of duty. The goods imported in the case at bar were foreign goods and did not become merged into the commerce of the country until the duties were levied and paid. (*Sonneborn Bros* v. *Cureton*, 262 U. S. 506, 509; *Faber, Coe & Gregg* v. *United States*, 19 C. C. P. A. (Customs) 8, T. D. 44851). A tax upon the imported goods, while it remains a part of foreign commerce and is not introduced into the general mass of property in a State, differs greatly from a tax upon the property after it has been imported. (*License Cases*, 5 How. 504, 575.).

In *Brown* v. *Maryland*, 12 Wheat. 419, at page 439, this Court announces the principle——

> A duty on imports is a tax on the article, which is paid by the consumer.

This doctrine has been uniformly followed since that decision, and based upon the authority of that case all of our customs statutes rest. It is the theory of customs jurisprudence that when merchandise is brought into the jurisdiction of the port of entry the duty attaches, and it is on that theory the Government retains possession of the importations either actually or constructively under bond for redelivery until all questions of duty are settled

and all exactions paid. If the duty did not attach to the merchandise itself, and hence become a lien upon the merchandise, it would be difficult to justify the retention of the merchandise by the Government until its exactions were collected. If the duty were a tax on the individual, he would be entitled to his merchandise and the Government would have to proceed against the individual.

This leads to the point we consider of the utmost importance to all industry in the United States and to the welfare of the individual States. If it is without the power of the Congress to levy duties upon merchandise imported by the several States of the Union, it is likewise without the power of the Congress to levy duties upon merchandise imported by other taxing entities of those States. It would logically follow that all municipalities, counties and other subdivisions would have the right to import merchandise without regard to restrictions, duties levied or embargoes placed upon such imports by the Congress of the United States. From the decisions cited no basis exists for that interpretation of the law. That it is the clear intent of the Congress to levy duties upon the importation of articles not only by States, municipalities and all others including the United States, is apparent from the fact that it deemed necessary the inclusion in the Tariff Act of 1922 of provisions exempting from duty certain importations for the use of the United States, the Library of Congress and State and public libraries:

> Par. 1527. Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress.
>
> Par. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or any college, academy, school, or seminary of learn-

> ing in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etchings, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

This, we think, is conclusive of our position that all customs duties are levied on the merchandise.

Conclusion.

To the States we represent it would be far more serious to destroy the ability of the Congress to protect certain industries from destructive foreign competition than to be obliged to pay import duties on foreign-made goods consumed by the State and its political subdivisions. For certain commodities produced and manufactured, public agencies are among the largest customers. Road-building materials are an excellent example. It would be disastrous, by adopting petitioner's argument in this case, forever to deprive the Congress of the power to protect against foreign competition, producers of these materials.

This is our reason for filing this brief in support of the Government's position.

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Attorney General of the Commonwealth of Pennsylvania.

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Attorney General of the State of New Jersey.

February, 1933.

APPENDIX.

Statutes Involved.

Act of Congress, September 21, 1922 (Tariff Act of 1922), C. 356, Title I, Sec. 1, 42 Stat. 858.

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes * * *

Section 1. * * * except as otherwise specifically provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * *

Par. 218. Biological, chemical, metallurgical, pharmaceutical, and surgical articles and utensils of all kinds, including all scientific articles, utensils, tubing and rods, whether used for experimental purposes in hospitals, laboratories, schools or universities, colleges, or otherwise, all of the foregoing, finished or unfinished, composed wholly or in chief value of glass or paste, or a combination of glass and paste, 65 per centum ad valorem;

Par. 228. Azimuth mirrors, sextants, and octants; photographic and projection lenses, opera and field glasses, telescopes, microscopes, and other optical instruments, and frames and mountings for the same; all the foregoing not specifically provided for, 45 per centum ad valorem.

Par. 360. Philosophical, scientific, and laboratory instruments, * * * and parts thereof, * * * 40 per centum ad valorem:

Par. 372. * * * all other machines or parts thereof, finished or unfinished, not specially provided for, 30 per centum ad valorem; * * *

Sec. 201. That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, the articles mentioned in the following paragraphs, when imported into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila), shall be exempt from duty:

Par. 1527. Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress.

Par. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or any college, academy, school, or seminary of learning in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etching, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

SECTION 8. The Congress shall have Power To lay and and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * * * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;